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TRIMBLE v. COVINGTON GROCERY CO.

Nov. 16, 1911.

[72 S. E. 724.]

1. Fraudulent Conveyances (§ 241*)—Remedies of Parties.—A creditor sued his debtor and served an attachment on R. to whom the debtor had conveyed a stock of goods, taking notes in part payment, and thereafter filed a bill in chancery alleging a sale of the stock by R. to T. without the giving of the notice to creditors as required by Code 1904, § 2460, and the attachment was brought into the chancery suit before any judgment was entered at law, and a decree was entered for the debt. Held irregular, as the proper mode would have been to have taken judgment in the action of assumpsit and reported the perfected lien in the chancery suit.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 241.*]

2. Fraudulent Conveyances (§ 54*)—Sale of Stock in Bulk.—Code 1904, § 2460, provides that a creditor, before obtaining a judgment or decree for his claim, may, whether it be due or not, institute any suit which he might institute after obtaining judgment to avoid a gift, assignment, transfer, etc., void as in fraud of creditors; and section 2460a makes a sale of a stock of goods in bulk prima facie fraudulent as to creditors unless notice is given to creditors of the contemplated sale. Held, that where plaintiff sued his debtor and served an attachment on R. to whom the debtor had sold a stock of goods, taking notes in payment, and thereafter, but before judgment for plaintiff was rendered in the action, R. conveyed the stock to T. without giving the statutory notice, R. was not a debtor of plaintiff within the statute.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 54.*]

Appeal from Circuit Court, Alleghany County.

Suit by the Covington Grocery Company against R. M. Trimble and others. From a decree in favor of complainant, defendant Trimble appeals. Reversed.

Geo. A. Revercomb and *R. C. Stokes*, for appellant.

C. B. Cushing, for appellee.

KEITH, P. Whitaker was engaged in the mercantile business in Covington, Va., and became indebted to various persons, including the Covington Grocery Company. While so indebted he sold his stock of goods and fixtures in bulk to R. L. Rose. Rose took possession of the goods and conducted a mercantile

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

business in the same building, purchasing from time to time other goods and adding to the stock purchased by him from Whitaker. Rose upon purchasing the goods paid to Whitaker \$300 in cash and executed two promissory notes, one for \$300 payable November 17, 1907, and the second for \$359.62 payable on December 1, 1907. Whitaker deposited the cash in the Covington National Bank to his own credit and placed the notes with the bank for collection. Rose conducted the business for a short time, and then sold the entire stock of goods and fixtures purchased from Whitaker, together with such as he had purchased from time to time, in bulk to R. M. Trimble, this sale taking place on November 20, 1907. Trimble took possession under his purchase, and conducted the business in the same store building, adding small purchases from time to time. He became indebted to various creditors whom he was unable to pay, and on the 26th day of December, 1907, executed a deed of assignment conveying his stock of goods, fixtures, and open accounts to Stokes and Revercomb, trustees, to be converted into money and the proceeds divided among all his creditors.

The Covington Grocery Company, learning of the sale of Whitaker to Rose, instituted an action of assumpsit against Whitaker in the circuit court of Alleghany county, setting up an account of \$964.62, and, Whitaker being a nonresident, an attachment issued out of the circuit court designating the Covington National Bank as being indebted to or having in its possession effects of the said defendant, Whitaker, and R. L. Rose as being also indebted to Whitaker. This attachment was sued out on the 9th of November, 1907, and a copy thereof was served on the Covington National Bank; and as appears from the record, as we shall hereafter endeavor to show, this attachment was also served upon Rose on the 11th day of November, 1907. On the 20th day of November, 1907, Rose sold the stock of merchandise in bulk to Trimble, as above stated.

At the December term, 1907, of the circuit court of Alleghany county, which convened on December 15th, in the attachment suit of the Covington Grocery Company against Whitaker, and the Covington National Bank and Rose, as garnishees, an order was entered which recites that the Covington National Bank has in its hands of the effects of H. E. Whitaker the sum of \$300 in cash, and that it also holds for collection two negotiable notes due to Whitaker from Rose, and it further appearing from the statement of Rose on oath that he is indebted to Whitaker in the sum of \$659.62 with interest on \$300 part thereof from November 17, 1907, and on \$359.62 the remainder thereof from December 1, 1907, until paid, as evidenced by the negotiable notes mentioned, and that the entire fund in the

hands of the bank, including the two negotiable notes, is the purchase price of a stock of goods purchased by him of H. E. Whitaker, it is ordered that the Covington National Bank pay to the clerk of the court the sum of \$300 and turn over to the said clerk of the court the two notes of R. L. Rose above described, and upon so doing said Covington National Bank shall be discharged from any further liability in these cases, and the said R. L. Rose is ordered to pay the clerk of this court the sum of \$659.62 with interest on \$300 part thereof from November 17, 1907, till paid, and on \$359.62 the remainder thereof from December 1, 1907, till paid, and, upon the payment of said amount with interest as aforesaid, the said clerk shall turn over to said R. L. Rose the two above-described notes duly canceled, and the said R. L. Rose shall be discharged from any further liability in these cases.

On December 14, 1907, the Covington Grocery Company filed its bill in chancery in the circuit court of Alleghany county, in which it sets forth that, in the sale from Rose to Trimble referred to in the foregoing statement of facts, he failed to take from Rose the proper affidavit and statements required by section 2460a of the Code of 1904; that neither party to the sale gave the required notice of said sale to any creditor of Rose; and that complainants received no such notice as the law contemplates, nor any notice whatever of the fact that such sale was contemplated until it had been fully completed. The complainants charge that owing to the failure of the parties to take the proper inventories and the proper affidavits, to give the proper notices required by law, the sale by law is deemed to be a fraudulent one, and that it is void as to complainants, and that whatever goods were passed from Rose to Trimble are still liable for complainants' claims against Rose; and that they are also informed and believe that any goods belonging to Rose, who has conveyed away most, if not all, of his goods in fraud of his creditors, are liable to be attached for any debts owed by him; and that, since said Trimble is deemed by the law to be a party to said fraud, any goods purchased from Rose by Trimble in said fraudulent transaction are liable to be so attached. Rose and Trimble were made parties defendant, answer under oath was waived, and the bill concludes with a prayer for the sale of the goods, the payment of complainants' debt, and for general relief.

The defendants answered the bill, evidence was taken, and the matter was referred to a commissioner, who reported in favor of the complainants. The report was confirmed, and the court entered a decree directing the fund under its control and the proceeds of the sale of the stock of goods purchased by Trimble

from Rose to be turned over to the Covington Grocery Company, and from that decree Trimble has appealed.

[1] It appears that the attachment at law of the Grocery Company against Whitaker was brought into the chancery suit before any judgment was rendered, when it stood merely upon an inchoate lien created by the levy of the attachment, and the circuit court proceeded to enter a decree for the debt. As what was done in this respect is not material to our conclusion, we mention it only to point out the irregularity of the procedure, lest it should pass into precedent. The proper mode would have been to have taken judgment in the action of assumpsit and reported the perfected lien in the chancery suit.

[2] The crucial question in this case is: At what moment did R. L. Rose become a debtor of the Grocery Company? There were no contractual relations between the Grocery Company and Rose. The Grocery Company was a creditor of Whitaker; Whitaker sold to Rose; the Grocery Company sued Whitaker, and, he being a nonresident, Rose was named as a debtor of Whitaker, and the attachment was served upon him. We say that it was served upon him, though counsel for appellant stoutly deny it. The service is charged in the bill.

The cause was referred, as we have said, to a commissioner, and that commissioner reports that the attachment was served upon Rose on November 11, 1907. To that finding of fact no exception was taken, and upon that statement of fact unexcepted to the court rendered its decree. At the same term an order was entered directing the money and property attached to be brought into court, but it was not until the decree of February 1, 1910, that there was complete adjudication of the rights and liabilities of the parties to this controversy.

The sale was made by Rose to Trimble on the 20th day of November, 1907. It is not averred that that sale was fraudulent otherwise than by failure to comply with the terms of section 2460a of the Code. The whole case was proceeded with upon the theory that it turned upon that statute—upon the compliance or noncompliance with its terms.

That section creates no new right of action. It is by virtue of section 2460 that a creditor, before obtaining judgment or decree for his claim, may institute a suit to avoid a gift, conveyance, assignment, or transfer of or charge upon the estate of his debtor. The effect of section 2460a is to provide that, the cause of action existing, certain consequences should be attributed to the doing or the omission to do. In the case of a sale in bulk of an entire stock of merchandise, which is enjoined or forbidden by its terms, the suit must be brought by the creditor of the

seller—a creditor existing at the date of the sale which is the subject of investigation.

In 1 Shinn on Attachments, § 313, it is said of a foreign attachment that it creates “only an inchoate or qualified lien, which may become perfected by being merged into the judgment thereafter obtained in the suit, and it may be defeated by a dissolution of the attachment. The attaching creditor acquires no property, neither general nor special, in either realty or personalty by his attachment. The title remains in the debtor, not only until the attachment lien is merged into a judgment condemning the property, but until a sale is made thereof. The only right the plaintiff acquires under his attachment levy is to use such measures as may be necessary to preserve his security until he can reduce his demand to a judgment. He cannot interfere with the claims of third persons. He has no right of possession and will have no right of action against one who takes the attached chattels from the possession of the attaching officer. While the attachment proceedings are pending, the officer controls the property and the plaintiff controls only the lien.”

In Waples on Attachments (Ed. 1885) p. 580 et seq., it is said: “By the law of relation, and attachment judgment retroacts to the time the property was first attached; to the time it was first subjected to garnishment; so that no incumbrances put upon it by its owner since that time can have higher rank than the attaching creditor’s lien. Such retroaction makes the lien perfect from its first inception as though created by the contract of the parties; as though it were a mortgage lien voluntarily put upon the property by the defendant himself. On the contrary, in case of final judgment for the defendant, there never has been any lien whatever; his subsequently created incumbrances, mortgages, or voluntarily bestowed liens of any sort are perfectly good, and the plaintiff’s claim has never been more than an ordinary one. * * * From the moment of service the lien is perfect—provided judgment recognizing the lien shall follow. From that moment the lien is nothing—provided no such judgment shall follow. The garnishee cannot know the future contingency. He is bound to hold the money, or goods, or indebtedness, subject to the order of court. * * * The plaintiff cannot enforce the lien till matured by judgment.”

The inchoate lien upon the property attached, when final judgment is rendered upon it, relates back to the date of levy of the attachment; but it cannot by relation render a transaction unlawful which was not unlawful at the time it took place. The levy having been made on November 11th, and the sale having been made on November 20th, the subsequent course of procedure in the attachment suit which culminated in the final decree

in 1910 cannot render fraudulent the sale from Rose to Trimble, if that sale were free from fraud at the time it was made. On the 20th of November, 1907, Rose was not the debtor of the Covington Grocery Company, unless that relation was established by operation of law as a result of the service of the process of attachment upon Rose on November 11th. By that levy the Grocery Company acquired a lien, but nothing more.

In *Manhattan Fire Ins. Co. v. Weill*, 28 Grat. 389, 26 Am. Rep. 364, a condition of a policy of insurance on a building was: "If the building insured stands upon leased ground, it must be so represented to the company, and so expressed in the written part of the policy; otherwise the policy shall be void." The assured had given a deed of trust upon the building to secure a debt, and it was held that this condition did not refer to the legal title, but to the interest of the assured in the property, and that the fact that he had given a deed of trust to secure a debt upon the property does not make the cestui que trust a joint owner.

The lien of the attaching creditor is likened to "a mortgage lien voluntarily put upon the property by the defendant himself." *Waples on Attachments*, p. 581.

It will not be contended that the beneficiary in a deed of trust which conveys choses in action to a trustee is such a creditor as before the execution of the trust would be entitled to sue under section 2460 to set aside a fraudulent conveyance made by the obligor in the choses of action covered by the deed, and yet the beneficiary under the deed has an interest identical in character with that of the attaching creditor. Section 2460a, assuming that it is constitutional, may be regarded as remedial, and should be so construed as to advance the remedy, but the relation of debtor and creditor cannot be held to flow from the inchoate lien of an attachment such as appears in this case in order to accomplish that result.

We are of opinion that under the facts disclosed in this record Rose was not, on the 20th of November, 1907, a debtor to the Covington Grocery Company within the meaning and intentment of sections 2460 and 2460a; that there was no obligation upon the part of Rose or of Trimble to comply with section 2460a; and that for the reasons stated the decree of the circuit court was erroneous and must be reversed; and this cause will be remanded to the circuit court to be further proceeded with in accordance with this opinion.

Reversed.